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No. 90-255

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NEW YORK TELEPHONE COMPANY
AND
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,

v.

JOSEPH CAHILL
AND
ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITIONERS' REPLY TO THE BRIEFS IN OPPOSITION

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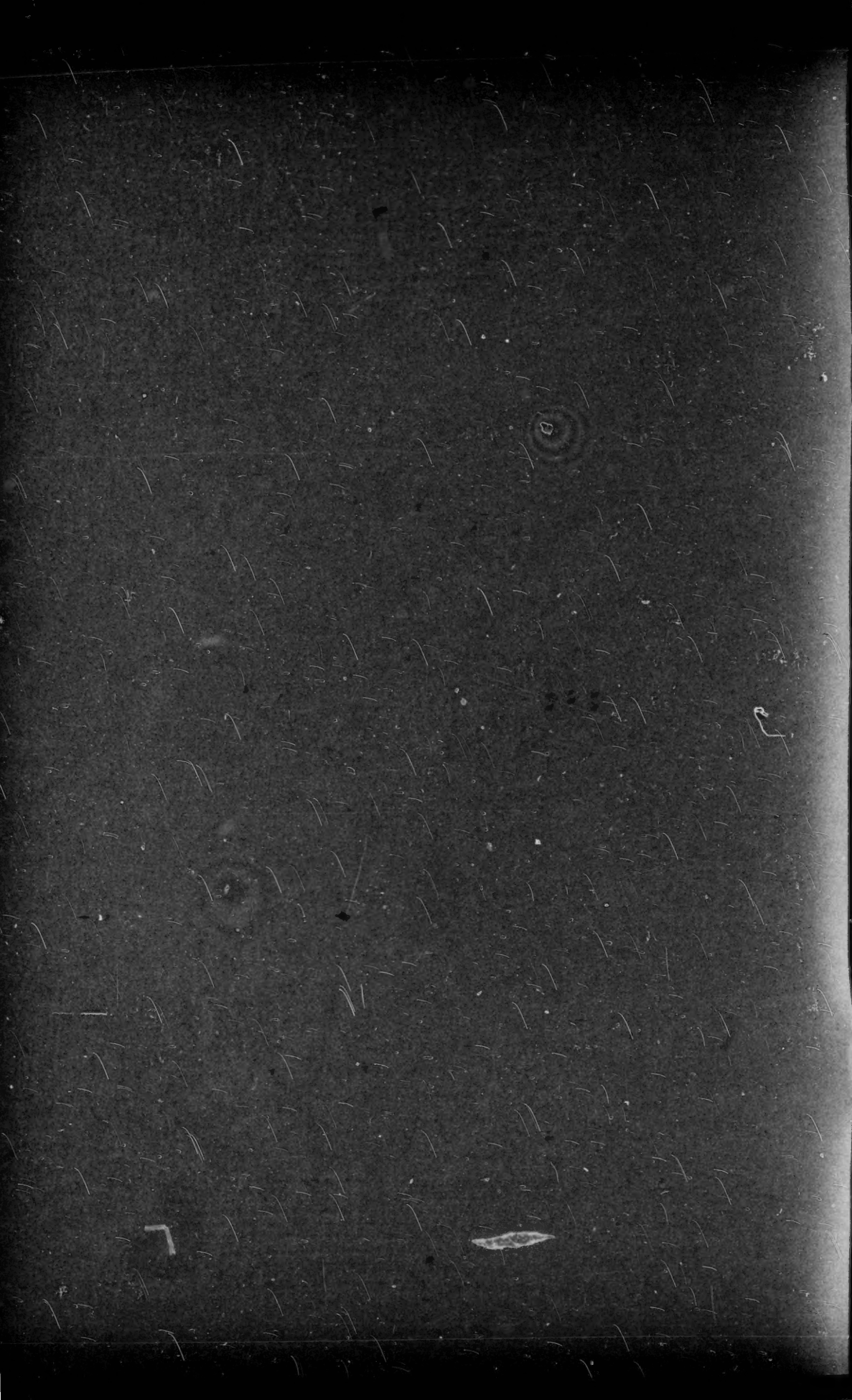
October 10, 1990

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS



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REPLY TO BRIEFS IN OPPOSITION

I. Respondents Are Grossly Mistaken in Suggesting That This Case is Non-Justiciable.

As their principal reason for opposing certiorari, respondents Cahill and Abrams contend at some length that there is no case or controversy for this Court to review because, they claim, the New York PSC has now reversed course and made a decision on the merits to exclude utility charitable contributions from the ratebase. (Abrams Br. 5-7); (Cahill Br. 12-23). *The PSC has done no such thing*. It has merely acceded *pendente lite* to the judicial decision of the New York courts because no party sought to have the mandate stayed pending appeal. The PSC had no choice but to put its 20-year-old contributions policy on hold while this case is resolved; if the state court decisions annulling that policy are reversed, the PSC policy, allowing petitioners to include certain charitable contributions, will once again prevail.

That this is so should have been clear to respondents from a formal stipulation adopted by the PSC in the very same ratesetting proceeding on which they rely. On April 15, 1990 — some months after the October 13, 1989 order that Cahill and Abrams invoke (Abrams Appendix A-6 to A-8) — the PSC removed any lingering doubt that it was merely staying its policy pending appeal: "Whereas . . . the outcome of the *Cahill* case is likely to have a substantial impact on the issues presented . . . in this proceeding, . . . all proceedings in this case until the aforesaid appeals and any further review or appeal of the *Cahill* case to the United States Supreme Court is exhausted" are "stay[ed]." (Appendix to Petitioner's Reply Brief ("Reply App.") at A-2).[1] This statement, issued shortly

[1] Petitioners assume that Mr. Abrams made his argument in good faith; but the fact that he is unaware of the PSC's own position on the subject confirms the fact that he does not in this case represent the State of New York and its PSC. See note 9, *infra*.

after oral argument in the court below, should come as no surprise to anyone, because the very PSC orders on which respondents rely make plain (when read in context) that the PSC was merely suspending allowance of charitable contributions pending the outcome of this litigation, for the simple reason that no stay of the intermediate appellate court order annulling that practice had been sought.[2]

Although Cahill represents to this Court that he did not make the same argument below (Cahill 14-15 n.*), he in fact did so, albeit unsuccessfully. (*See* Transcript of Oral Argument, Reply App. A3-4). The Court of Appeals rejected Cahill's argument and proceeded to review this case on the merits, and petitioners urge this Court to do likewise.[3]

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[2] With respect to the particular utility companies involved in this case, the PSC's September 25, 1984 order, as respondent Abrams describes it, ordered the companies "to establish special accounts into which the utilities were directed to pay amounts equal to the charitable donations which were recovered under the now superseded rate case orders." (Abrams Br. 3). Such "deferrals" indicated no change in the PSC's substantive policy but rather were "necessary to insure that the mandate of the Court is complied with . . .." (Abrams App. A-3). As the PSC noted in the October 13, 1989 order to which respondents refer, "all court appeals have not been exhausted" and, "if the final outcome of *Cahill* supports an allowance, we can prescribe a method for recovery of the deferred amount." (Abrams App. A-7). Respondents likewise misrepresent the third PSC order, of July 6, 1990, in the RG&E case, from which they excerpt only meaningless tables (Abrams App. A-9 to A-19), omitting the Administrative Law Judge's Decision that was adopted by the PSC (Opinion No. 90-17 at 66). That Decision stated, at page 20, that charitable contributions were removed from the ratebase "pending resolution of the appeal from the Appellate Division's ruling in *Cahill* v. *PSC*. RG&E says that in the event the appeal succeeds, it would seek later recovery of the forecasted amounts. [The PSC's] staff apparently agrees, with the proviso that recovery should not exceed actual contribution amounts." It follows from this virtual escrow arrangement that, even if the PSC *had* changed its policy, or were to decide for some other reason to exclude charitable contributions from the ratebase in the future, petitioners would have a vital fiscal stake in the outcome of this case, and respondents' justiciability argument would still be indefensible.

[3] Seeking to brush aside the Court of Appeals' obvious conclusion that this case was not mooted by a fictional change in PSC policy, Cahill treats the decision below as a state court advisory opinion unreviewable by this Court. (Cahill Br. 14-15 & n.*). That characterization would surely surprise the court

Respondents' suggestion that this appeal may not provide the relief petitioners seek because, whatever its current policy, the PSC *might* some day change its mind (Abrams Br. 5-6; Cahill Br. 16-21) makes no sense. Without relief from this Court, petitioners stand to lose a great deal, both in terms of contribution expenses thus far deferred (see note 2, *supra*), and in terms of the disallowance of future contributions. And relief from this Court would not be rendered worthless by the mere prospect that the benefits to petitioners *might* be short-lived *if* a future PSC were to revert to its pre-1970 policy. For that is the sort of sheer speculation that would deprive this Court of jurisdiction in *every* case in which it was conceivable that the statute or rule at issue might, some day, be changed to a litigant's detriment by the legislative body that adopted it.[4] The controversy in this case is thus quite real and very

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below since it expressly noted that NYTel and RG&E were before it on an appeal "as of right." (A3). Indeed, the very case Cahill invokes to suggest that the court below might have rendered an advisory opinion makes plain that it did not do so, and could not have. For the case Cahill cites, again directly contrary to his representation in this Court, holds that the New York courts are no more free than federal courts to decide moot, abstract or hypothetical cases! *See Hearst Corp* v. *Clyne*, 431 N.Y.S.2d 400, 402 (Ct. of Appeals 1980) (*cited in* Cahill Br. at 15 n.*) ("It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal. This principle . . . forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions . . . .").

[4] If it were not enough that the factual premise of respondents' justiciability argument is a total fantasy, they have gotten the law wrong as well. Respondents' citation of cases like *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), and *Allen* v. *Wright*, 468 U.S. 737, *reh'g denied*, 468 U.S. 1250 (1984) (Abrams Br. 5-6; Cahill Br. 17-21), is completely inapposite. Those cases are about *standing*, and they simply refuse to accord standing to private *plaintiffs* who seek to overturn government policies on "speculative" theories that *if* those policies were overturned *other* private entities might be encouraged to act in ways beneficial to the plaintiffs. There is obviously no such problem here, where state-court *defendants* merely seek the removal of an erroneously interposed federal bar to their continued enjoyment of a long-standing state policy in their favor.

much alive, and the First Amendment and state action issues — issues that respondents evidently would prefer not to analyze closely — are fully justiciable and worthy of this Court's attention.

II. The State Action Issue, and the Appellate Court Conflict Thereon that Respondents Do Not Deny, Merit the Plenary Attention of This Court.

Respondents do not even attempt to deny that the court below brushed aside this Court's state action precedents and instead based its finding of state action on public employment/union dues cases that had no occasion to address the state action issue. But neither respondents nor the court below can elude this Court's square holding in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), that "[a]pproval by a state utility commission of . . . a request [to engage in routine business practices] from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" *Id.* at 357 (emphasis added). This is precisely what happened here. NYTel treated "as an operating expense" (A66) some of its non-political, non-religious charitable contributions and sought approval from the PSC for inclusion of that sum in the ratebase, so that NYTel might, in accord with federal tax and regulatory accounting principles, enjoy under state law the freedom to count such contributions as a business expense — a freedom that non-regulated businesses routinely enjoy. (A66-67).[5] The PSC, in 1970 and since, has merely *approved* the inclusion of charitable contributions in the ratebase; it has

[5] In an attempt to escape the force of *Jackson*, Cahill seeks to distinguish non-regulated companies from utilities by pointing out the fact that the latter are legal monopolies. (Cahill Br. 30-31 n.*). But that obvious fact was already taken into account in this Court's analysis in *Jackson*. *See* 419 U.S. at 357.

not "*ordered*" the utilities to make such contributions nor *required* them to include contributions in their rate requests.

The judgment below attributing that private practice to the state not only violates this Court's state action rulings, but also conflicts with two federal Courts of Appeals decisions that have held, in accord with *Jackson*, that mere regulatory acquiescence in a telephone company's business decision does *not* make a public service commission constitutionally accountable for any alleged First Amendment abridgement entailed by that private decision. Although Cahill appears to have overlooked them, those cases are discussed in the Petition at pp. 12-13.

III. The Radical First Amendment Right Pioneered by the Court Below Should Be Reviewed and Rejected by this Court.

Respondents do not even attempt to deny that the decision below flouts the well-settled rule that, where the government has instituted a neutral policy of general application completely unrelated to the suppression of speech, such as a rule requiring utility ratepayers to pay for all of the utility company's operating expenses, the government must be free to implement that policy uniformly — even over the sympathetic claim of an individual that the policy has an indirect impact on values protected by the First Amendment. (Pet. 16-17, 22-23).

Nor does either respondent contest the proposition that the decision below turns the First Amendment into a mechanism for demanding a compelling state interest to justify any utility business expense — whether a gift to the March of Dimes, a purchase from a non-union supplier, or an employee health plan providing controversial abortion services — that some ratepayer might perceive as having even an incidental expressive element or ideological tilt. (Pet. 21-25).

Moreover, respondents do not dispute the fact that the cases on which the court below relied, including *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977), establish only the principle — which Cahill concedes is not implicated here — that an individual may not be forced by the government to espouse, associate with, or be identified with views he or she finds objectionable. (Pet. 17-18; 20-21).

The only basis Cahill offers for reading the element of compulsory association out of *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977), and its progeny is what he calls "Thomas Jefferson's 'ringing alarm,' invoked by this Court in *Abood*, that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.' " (Cahill Br. 33-34). But surely that admittedly moving but out-of-context excerpt from the passionate Establishment Clause debate,[6] included as dictum in a footnote in *Abood*, is an inadequate ground for reinterpreting an entire line of cases which had heretofore been understood as requiring an element of coerced association or public identification with the views of another. The principle announced below would require that, any time an individual would have to bear some indirect cost of another's conduct that might be deemed to have some expressive element — even if the individual would never be identified with that expression — the state *must* forbid the imposition of that incidental cost unless it can demonstrate a compelling state interest in not doing so. At the very least, this Court should set the matter for plenary briefing and argument before summarily recasting the entire *Abood* line of cases

[6] The passages originally quoted by this Court in *Abood*, 431 U.S. at 234-35 n.31, referred to or in turn quoted from Jefferson's Virginia state Bill for Religious Liberty, which was, according to the Court's source, "Madison's and Virginia's answer, in behalf of the people of that state, to the attempt to establish religion by opening the public treasury to the teachers of it." I. Brant, *James Madison: The Nationalist* 354-55 (1948).

and unleashing a new constitutional principle with such momentous implications.

The court below candidly admitted that its new First Amendment principle cannot readily distinguish between ratepayers and taxpayers and therefore casts doubt on the constitutionality of using government tax dollars or deductions to fund programs or speech that some citizens might find offensive. (A9) (Pet. 26). Yet Cahill insists that this threat is baseless and that the distinction is clear, relying solely on Justice Powell's concurring dictum in *Abood* that, unlike a "private association," the "Government is representative of the people." 431 U.S. at 259 n.13. (Cahill Br. 39-40).

As we have already explained (without rebuttal by respondents), this dictum alone is not an adequate distinction in the context of *this* case (Pet. 27-28). For just as the government gives individual and corporate taxpayers the right to deduct, and therefore to make their neighbors share the cost of, their charitable contributions, likewise the New York Legislature and its agency, the PSC, as representatives of the people, have given utility companies the right to include in their ratebase all reasonable operating expenses, including non-political, non-ideological charitable donations.[7] Surely the real reason

[7] Cahill asserts that the PSC allows utilities to include in their ratebases contributions to political and advocacy organizations. (Cahill Br. 2-3). Since Cahill has never put on any evidence of his own, nor challenged NYTel's evidence and affidavits (Pet. 7), he bases his accusations entirely on the annual report NYTel submits to the PSC (*see, e.g.*, JA 690-709) — which he has evidently misread. The listed donations to organizations such as NOW and NAACP go *not* to advocacy or other ideological activities, but to such traditional charitable activities as programs for battered women or abused and neglected inner-city children. One must also keep in mind that less than half of NYTel's total contributions listed in the report are passed on to ratepayers; most of the expense is borne by the shareholders. (Pet. 5). Moreover, Cahill cannot deny that both state law and NYTel's own policies forbid the recovery in rates of any political, lobbying, ideological or sectarian religious expenditures. (Pet. 4-5 & n.6) (JA 547-52). Ratepayers may object in PSC ratesetting proceedings to donations they perceive as transgressing this standard, and the PSC when

that government funding or tax deductions do not implicate the associational right recognized in *Abood* is that, "[w]hen the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated." *United States* v. *Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989). Plainly, the nexus between utility ratepayers and utilities' charitable contributions is equally attenuated — no one will ever associate Cahill with NYTel's corporate philanthropy simply because he pays his phone bills. There is no way of distinguishing ratepayers from taxpayers under the decision below. At the very least, the question merits the plenary attention of this Court.

Respondents do not and cannot deny that the decision below threatens the policies of the FCC and the FERC (both of which deem charitable contributions to be reasonable operating expenses) (Pet. 2 n.2), as well as the utility policies of many state regulatory bodies — at least 18, even by Cahill's count[8] — that likewise allow inclusion of charitable contributions in the ratebase. Cahill obliquely dismisses the interests of these sovereign states with the observation that many of the decisions affirming their contribution policies "are by state public service commissions, not by courts." (Cahill Br. 7 n.*; 39). This remark reveals a fundamental misunderstanding of our form of government — policy choices about utility regulation are *supposed* to be made by the legislative and executive branches, not dictated by courts invoking spurious First Amendment arguments.

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so asked has disallowed non-complying utility contributions. Cahill, of course, never pursued this avenue of relief because Cahill's real complaint, as revealed by his own verified petition, is an objection on "personal grounds" to utility support for "all charities in general." (A63).

[8] Cahill's dispute over the policies of a few of the states enumerated in the Petition (Cahill Br. 6-7, n.*) is based on a debatable reading of the relevant cases and does nothing to diminish the fact that the rights of many states to establish their own regulatory policies would be threatened by the principles adopted below.

CONCLUSION

Even if Cahill were correct in saying that the decision below concretely injures "only" the petitioning utilities and the State of New York,[9] that — coupled with the violence the decision does to constitutional doctrine — would be sufficient reason for this Court to grant a writ. In *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697 (1986), this Court issued a writ of certiorari to the New York Court of Appeals when that tribunal extended this Court's First Amendment cases so as to restrict the legitimate scope of state commercial regulation and police power. In *Arcara* the Court of Appeals was reversed because, while "[p]urporting to apply" a test set forth by this Court, it "ignored a crucial distinction between the circumstances" of the government precedents and the case at hand. 478 U.S. at 701, 703. In stripping *Abood* of its emphasis on coerced association or identification with the expression of another — phenomena that are conceded by all to be lacking here — the court below

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[9] Contrary to Cahill's misunderstanding (Cahill Br. 12), respondent Robert Abrams does not purport to speak for the State of New York in opposing certiorari. Abrams himself states that in this case he acts as "*parens patriae*." (Abrams Br. 2). Abrams' attack on the constitutionality of his own state's policy confounded the Judges of the New York Court of Appeals, and Abrams' counsel spent nearly half his oral argument in the court below defending Abrams' role in this case. (Reply App. A4-5). Abrams' counsel explained that, although the Attorney General usually "acts as counsel to the state," here he was *attacking* the state as an exercise of his "common law responsibility to represent the citizens of the state and the citizens of the state are the ratepayers." (Reply App. A4-5). It is doubtful that Abrams' posture is sufficient to meet this Court's test for *parens patriae* standing in a federal court, where the mark of a quasi-sovereign interest is "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Alfred L. Snapp & Sons, Inc.* v. *Puerto Rico*, 458 U.S. 592, 607 (1982). New York, of course, has already addressed the issue, through legislation and the policy judgment of its PSC, and it is precisely those sovereign acts of lawmaking that Abrams attacks.

Fortunately for Cahill, his status as a respondent here is secure, and this Court's jurisdiction to proceed to the merits is not in doubt.

has repeated the same error, and has escalated it. The same corrective steps by this Court are accordingly in order.

Respectfully submitted,

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October 10, 1990

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

STIPULATION
Index No. _____

In the Matter of the Application of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.,)
Petitioner,)
for a judgment pursuant to Article 78)
of the CPLR,)
)
—against—)
)
PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,)
Respondent.)

WHEREAS, this proceeding was commenced in the Supreme Court of the State of New York, County of Albany, by service of a notice of petition and verified petition on January 23, 1990,

WHEREAS, in two cases directly related to the issues presented in this proceeding, *Cahill v. Public Service Commission* and *Abrams v. Rochester Gas & Electric Corporation* (the "*Cahill* case"), two of the parties-respondent have perfected their appeals in the Court of Appeals of the State of New York; and

WHEREAS, the Notice of Petition served by Petitioner in this proceeding provided for a return date of May 18, 1990; and

WHEREAS, the parties believe that the outcome of the *Cahill* case is likely to have a substantial impact on the issues presented to the court for review in this proceeding; and

WHEREAS, in order to avoid potentially unnecessary and duplicative litigation, the parties hereto wish to stay all proceedings in this case until the aforesaid appeals and any further review or appeal of the *Cahill* case to the United States Supreme Court is exhausted;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties hereto that the parties request the postponement of the return date of this proceeding to December 7, 1990, consistent with their desire to await the outcome of the aforesaid appeals and reviews of the *Cahill* case in the Court of Appeals and the United States Supreme Court.

Dated: April 12, 1990

ELEANOR STEIN
Attorney for Respondent,
Public Service Commission
of the State of New York

Dated: April 15, 1990

JOHN D. MCMAHON
Attorney for Petitioner,
Consolidated Edison Company
of New York, Inc.

APPENDIX B

PARTIAL TRANSCRIPT OF ORAL ARGUMENT BEFORE THE COURT OF APPEALS OF THE STATE OF NEW YORK MARCH 29, 1990

* * * * *

RE [Richard Emery, Counsel for Petitioner Cahill]:
[The PSC policy] is a discrete, clear policy that was adopted in 1970, and which, by the way, the PSC is now apparently in the processes of abandoning because they're not here today. They are in fact acceding to the Third Department decision which is very clear and very to the point, that there is no such compelling state interest available.

COURT: Is there any question of mootness now at their being out of it?

RE: Well, I did not raise it in the brief; New York Telephone raises it in a footnote; I think there is a question of mootness as to these parties. These parties are here, operating under a policy which no longer directly applies to them. Their latest rate orders do not accede to the Third Department decision. There has not been a wholesale abandonment of the policy because the PSC is abandoning it as every rate decision comes up. There's an argument that we could go back to the Third Department, try and hold the PSC in contempt because they haven't done it across the board in the context of the Third Department's decision, but that aside — we're not doing that — that aside, these parties here are essentially arguing the PSC's case.

The PSC is not here. In some sense you could argue, I think, that these parties, New York Tel. and Rochester, are here in it saying that "you must order the PSC to go back to their old policy," that it's constitutionally necessitated. That's almost the burden on them if it's not a moot case. And of course there's no argument for that — there's no way this court would ever compel the PSC to adopt this policy, which is in essence I think the burden that they have to overcome here. So I think there is a question of mootness here with respect to these parties.

* * * * *

RG [Richard Golden, Assistant Attorney General, Counsel for Petitioner Robert Abrams, Attorney General of New York]:

May it please the court, the essence of this case is that the Public Service Commission coerced ratepayers into supporting the utilities' favorite charities. Every time the —

COURT: Doesn't the Attorney General represent the state agency?

RG: The Attorney General both represents state agencies as counsel to the state, and also —

COURT: Isn't there a conflict here, with the Attorney General representing the respondent-petitioners here when you're supposed to be upholding the constitutionality of a statute with the agency?

RG: The Public Service Commission has its own counsel and we do not represent them. In this case we represent the ratepayers of the utilities.

COURT: If there's an attack on the constitutionality aren't you supposed to be informed and aren't you supposed to come in and defend the constitutionality of a statute?

RG: You may recall, your Honor, that when this case was only concerned with the state action question, the Attorney General, even though he thought the —

COURT: It may not bother anybody else —

RG: We did not participate in that phase of the case, the Public Service Commission did not ask us to defend it, they have their own counsel, as I said, and they have never objected to our taking the position in this case that we have.

COURT: Well they're not even here.

RG: Well they never did before, and this the third level of review of this order. The Public Service Commission has never challenged our role.

COURT: Is it for them to raise the challenge, or is it a concern within your own responsibility or the responsibility of your office in terms of what Judge Titone is inquiring about in terms of defending constitutionality?

RG: The Attorney General has a common law responsibility to represent the citizens of the state, and the citizens of the state are the ratepayers. So it's entirely within the Attorney General's role to stand forward today in opposition to this unconstitutional exaction.

* * * * *

COURT: Mr. Clarke, could you help us with the mootness issue?

JC [John Clarke, Counsel for New York Telephone Company]:

Yes I can, I would refer you to *Cornelius* footnote 1 on that, your Honor; plus if you look at the — that's as to the law on this subject — and if you look at what the Public Service Commission has done, it has merely said that it is acceding to the mandate of the court. They can't flout the court's Appellate Division order here, but they have set up their structure so that they did not pull the rug out from under us on the appeal — counsel has represented that, Public Service Commission counsel has represented that to me, and if the court reverses the Appellate Division, then we go back to the situation we were in before. The Public Service Commission has not changed its policy, you have not seen one word saying that the Public Service Commission now believes that these are not reasonable business expenses. They still believe the same thing, they're merely acceding to the rule of law without a stay on the Appellate Division decision.

* * * * *